CA|RR|D Californians Advocating Responsible Rail Design

The newest iteration of the California High Speed Rail business plan

What is the plan?

The document is a lengthy 212 pages, filled with "political rhetoric" but has few details of the actual service, for example the travel time for trains from Los Angeles to San Francisco. Backup documents are referenced but (at least to date) are nowhere to be found, even at the URLs given in the report.

There are discussions of San Joaquin trains using the initial construction segment but no discussion of what cities would still receive service and where stations would be located, not to mention the fate of local train service after initial high speed rail operations begin. A connector between the tracks used by Amtrak today and those that will be built for high speed rail is mentioned. Where would this be? Cost savings have come from pushing off service to Anaheim, yet press reports say that Anaheim has been promised service behind closed doors.

Indeed there seem to be at least 4 plans. There is the plan in the program level environmental work, which the Authority will approve (for the third time) on April 19th that includes a full 4 track system on the Peninsula.

There are the plans in the project level environmental documents, which up to this point have not acknowledged Amtrak service.

Then there are the promises made to transit organizations and cities that don't appear in any formal documents. There are hints that the rail authority would be perfectly happy if it doesn't have to spend money getting all the way to the TransBay Terminal or that a meet up with BART in Livermore and service via Altamont to San Jose might obviate the need to build an expensive route through the Pacheco Pass.

Finally, there is the unspoken but most realistic plan. Just get started and people will have to give you money to keep building.

What is the legal basis for extending money for the "bookends"?

The business plan says that some of the money will come from the $950 million reserved for local transit in the bond. The bond, however, had a precise formula for distributing these funds to different transit agencies that is not in line with the Authority's plans. BART, for instance, is due $270 million, money it urgently wants to replace its aging fleet. If BART gives this money to high speed rail, it will presumably want this money back from another source. Is this legal? Is it just robbing Peter to pay Paul?

Another billion dollars is to come from the core bond measure. The bond measure has many requirements, including matching dollars from non-state sources and a requirement that the segment be high speed rail ready. There are no plans to electrify the southern

California corridor now. How can this be high speed rail ready? What is the source of the matching funds?

What is the long term plan for local train service in the Central Valley?

The plan almost indicates that there will be blended service in the Central Valley. Trains travelling at 220 mph do not mix well with lower speed regional trains. In Europe, the general strategy has been to segregate local service from the high speed routes to provide the most direct point to point service between the large cities on the ends of the line. What is the plan here?

Where does San Francisco's TransBay Terminal fit in?

We can find mention of the TransBay Terminal as early as the Bay to Basin Phase, but the budget does not seem to include any costs for it. What does this mean for San Francisco and how does this relate to the requirements of Prop 1A?

Are the upgrades to the "bookends" compatible with the final build out plans?
We are very unclear on what the final build out plan is for Los Angeles. Are the enhancements planned actually compatible with the eventual final build out plan for LA?

Potential concerns

No grade separations are planned for parts of the Peninsula, even with 10 trains per hour in each direction. While there may be capacity on the tracks for this number of trains, if they all travel at Caltrain speeds the impact on local signalized traffic intersections will be substantial and will likely lead to calls for grade separations because of the gate down time. The cheapest grade separations are the aerial structures that have been the cause of tremendous angst on the Peninsula. Is the current version of a blended system realistic or acceptable to local residents?

Los Angeles to San Francisco travel times are important. The success of high speed rail service depends on travel times that are competitive with air travel and a high reliability of service. This is one of the reasons that the bond measure included language which defined travel between SF and LA at two hours and 42 minutes. A number of compromises have been made in the urban areas, adding to journey times. The Authority has also decided to continue using a detour to Palmdale. There will be inevitable additional add-ons (signaling system issues, requirements to slow in urban areas, etc.) that will likely affect travel times. None of the ways to potentially shorten the route have been seriously explored.

Viability of the initial operating segment. The ridership model continues to have significant issues that raise questions about its commercial viability. Current revenues from San Joaquin Amtrak service that include service to Sacramento and many different stations total $30 million. The IOS will need revenues that are 10 times that amount to break-even for a skeletal system. The proposed service would be more direct for some people, less

direct for others, serve fewer stations and cost much more for everyone. The Seville-Madrid High Speed Rail line took 4 years to reach 2 million passengers. The "low scenario" in the plan predicts 3 times as many riders for Merced to Sylmar. There are some known flaws in the model, like the fact that it shows people as being happy to drive 100 miles to take the service and no penalty for transfers, which can explain the over-prediction of ridership.

Cap-and-trade. There is a new discussion of using cap-and-trade revenues. We would reiterate a few points that have been made in the press. First, carbon trading has proved to be very technically fraught and no one should be counting chickens before they are hatched. Second, from an emissions standpoint, this project will almost surely increase emissions during the very lengthy construction period that is the current subject of emissions trading. Third, this is a pre-existing source of funding that many other agencies are hoping to utilize.

Thinly spreading money around has ramifications. The current plan's approach to spend a little money here and a little money there may be good politics, but it comes at a large cost. State bond dollars can typically be used as matching funds and levered to get 4-5 times as much in federal funding. The enormous funding gap between the initial Central Valley construction effort and a viable high speed rail route just got larger, which means that if it takes longer to get more money, it will also take longer to build and operate a system.

Blended operations and a Northern California Service. These are all great concepts and we're supportive of this conceptually, but the devil is always in the details and those are lacking.

What changed? The biggest concern is that the plan is not fundamentally different from before. There is speculation about when train service will start but that will be dictated by the availability of capital and the interest in the private sector in offering service. We are still waiting to see someone step up to the private investors table.

ORANGE COUNTY
BUSINESS COUNCIL

2 Park Plaza, Suite 100 | Irvine, CA 92614-5904 | P 949.476.2242 | F 949 476.0443 | www.ocbc.org

April 11, 2012

Dan Richard, Chair
California High-Speed Rail Authority Board
770 L Street, Suite 800
Sacramento, CA 95814

RE: High Speed Rail Into Anaheim

Dear Mr. Richard:

First, as background, Orange County Business Council is the leading voice of business in Orange County, California, America's sixth largest county, with more population than 22 states in the union. OCBC represents and promotes the business community, working with government and academia, to enhance Orange County's economic development and prosperity in order to preserve a high quality of life. Orange County is an internationally recognized hub for global and midsize biomedical and information technology companies. The county is home to industry leaders in the fields of tourism, sports and action apparel, video gaming, and international trade.

OCBC serves member and investor businesses with nearly 250,000 employees and 2,000,000 worldwide and provides a proactive forum for business and supporting organizations to assure the financial growth of the region. Enhancing the investment in regional infrastructure, including a viable high speed rail system, has been a core initiative of the board's strategic plan.

Thus, congratulations on the release of your revised 2012 Business Plan. As collaborative partners in creating a high-speed rail system in California, we are among the many voices who are pleased to see that the Authority is developing a Business Plan that will build the system faster and more cost efficiently.

We are clear about the benefits that will be derived from a high-speed rail system in California. From greater mobility, to environmental benefits, to job creation, to the vast economic benefits, every country in the world that has a high-speed train system has been enhanced by its development. In the U.S., California is once again on the forefront of innovation, the first in the nation to create a system that we believe will ultimately lead to improved passenger rail travel throughout the country.

As we move in that direction, we believe it is absolutely critical to ensure all major cities in the state are included in the project, providing a seamless system with the fewest number of train changes to ensure California's passengers receive the best possible service. To this end, the city of Anaheim—one of California's 10 most populous cities--the Orange County's business community and local labor organizations encourage you to reconsider your recent proposal to make Los Angeles Union Station, rather than Anaheim the local endpoint. While we applaud the Authority's desire to reduce the cost of constructing the system by utilizing regional rail as an extension of the HSR system, we are concerned that a train change at Union Station may unnecessarily burden passengers and potentially impact utilization of rail for one of the state's leading employment regions and tourist destinations.

The revised Business Plan does not preclude full HSR build out through the LOSSAN corridor; however we believe that the emphasis on the LOSSAN improvements for enhanced Metrolink and Amtrak service may not fully meet the need of southbound customers. While "full build" into Anaheim would include additional tracks and electrification through the corridor, we respectfully request that you develop a "one-seat ride" for passengers into Anaheim, consistent with the efforts you are currently undertaking in the Caltrain corridor in Northern California.

Thank you for your attention to this issue. We are confident that by continuing to work collaboratively, the Authority will develop a project that is fiscally responsible and in line with the transportation needs of California. The high-speed rail project is the largest infrastructure program to be built in California in the last 50 years. But as this 100-year project proceeds, we must not forsake the foresight and intent with which it was first envisioned. By ensuring we are connecting all major cities, including Anaheim, we will optimize the system and provide ongoing benefits for the entire state and region for years to come.

Sincerely,

Lucy Dunn
President and CEO
Orange County Business Council

LD:l
Cc: Will Kempton, CEO, OCTA
Jim Adams, LA/OC Building Trades Council
Patrick Kelly, Teamsters
Kate Klimow, Vice President, Government Affairs, OCBC

Supporting Disabled Veteran Business

Subject: Alliance Testimony at CA High Speed Rail Board Meeting 19 April 2012

Our Alliance has been actively involved with CAHSR staff and Padilla and Associates regarding your small business plan. We made a significant input to you during the public comments period, have met with your staff and have corresponded by phone and emails over 30 times.

Our organization was founded to support the State's DVBE program and provide oversight when needed, to assist state agencies in meeting the 3% DVBE goal in state contracting.

As now written, your small business plan has no goal specifically established for DVBE participation nor does your agency have a small business and DVBE advocate position.

At the beginning of your hearings we made comments some two years ago stating that the 25% SB and 3% DVBE goals should be increased to 30% and 5%, and that DBE goals should be considered not to interfere with the SB and DVBE goals and we maintain that position.

However your plan as now written does not fence any DVBE goals and that is unacceptable. We understand that in your planning you had to consider state funded projects as well as those which include federal dollars. And it is your intent to use SB and DVBE goals in the former. However, you have presumed that when federal dollars are included in allocated funds that you must have DBE goals and cannot add DVBE goals, similar to what is done in the Federal DOT DBE program under Title 49.

One of your actions has been to enter into agreement with FRA to use best practices of that Title 49 program. And your presumption in the building of your small business plan is that FRA controls what goals are in HSR contracts when federal funds are included in the allocations.

Our Alliance refutes that presumption noting that FRA has no statutory authority under CFR 49 and that they can only advise what goals CAHSR uses.

As now written the small business plan, if approved, would allow all CAHSR projects to be completed with no DVBE participation and could In fact be completed with only DBE participation.

This is in violation of state law. As such we demand that you table the vote today and work with our organization, DGS, Caltrans and if desired FRA to restructure this plan to bring it in line with state law.

If this is not done our organization will have no option but to pursue all legal remedies to bring CA HSR into compliance with the law which would carry the potential consequence of delaying any further construction actions by CAHSR until resolved.

CALIFORNIA DISABLED VETERAN BUSINESS ALLIANCE
1611 S Street, Suite 102, Sacramento, CA 95811 • P: 916-446-3510 • F: 916-446-3515 • www.cadvbe.org

San Joaquin Valley
Black Contractors Assoication
1330 E. Truxtun Ave
Bakersfield, Ca. 93305

Date: April 18, 2012

California High Speed Rail Authority
Chairman & Board Members

Re: April 19, 2012 Board Agenda items # 5, 6, 7, 8, 9

Public Comment

Remark by **Marvin Dean** Bakersfield California on behalf of:
- San Joaquin Valley Black Contractors Assoication (**SJVBCA**)
- National Black Contractors Assoication (**NBCA**)
- Kern Minority Contractors Assoication (**KMCA**)
- Associated Professionals and Contractors (**APAC**)

Concern / Background – Request*

> Item # 5, # 6 Amendments to Consultant & PMO Contract
- Consultants have **poor track record diversity** sub contracting to date till **no African American sub consultant** on any team. **APAC file complaint** with **FRA** – CEO **Van Ark agrees** to **include SB/DBE goal in contract** when contract **come up for renewal.**
* **Request** the board **require SB/DBE goal** be **apart amendment** of Consultant & PMO **Contract.**

> Item # 7 Revised SB/DBE Program
- We are please CHRSA SBP 30% project goal – but **currently program don't insure diversity** or **minority** will be included - **small business** don't mean diversity or minority business.
* **Request** the board **require a separate DBE goal** be apart of the **Small Business Plan** – FRA **federal funding allow CHSRA** to **set a DBE goal** that provide diversity / minority opportunity

> Item # 8 Formation Business Advisory Council
- We support CHSRA formation of small advisory council require by FRA September 15, 2011 letter
The **wording Business Advisory Council does** that **mean Small Business Council** ?
* **Request** the board **require staff to have an open & fair process** appointment of **council members**
Request staff **explains today who will be making those appointment** & **process for appointment** ?

> Item # 9 RFP – Enforcement SBP
- We believe that their should be some kind of enforcement action if goal not net
* If not their no reason for the firms to do anything to meet the goal and it unfair to the firms that work to meet the project SB/DBE/MB goal.

We ask that the Board take this step today to show its strong committen to diversity in spending state & federal fund in the construction of high speed rail projects. Our minority members have been long time supporter of this project and voted for the High Speed Rail California Bond Proposition.

stewart
title guaranty company

LOUIS CANARAS
Vice President
Houston Commercial Production Mgr.
National Title Services Underwriter

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April 18, 2012

Attention: Chairman Dan Richard, Executive Board California High Speed Rail Authority
Thomas Fellenz, Esq.
California High – Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

RE: Title Insurance

Dear Mr. van Ark and Chairman Richard,

In anticipation of your Thursday, April 19, 2012 Executive Board meeting and so that the Board Members and C.H.S.R.A. Counsel Thomas Fellenz and Staff may review this Pro-forma actual policy used in one of our transactions involving Colorado Transmission Line, to better understand what our proposed $300 Million Title Insurance Policy covering new 300 mile alignment of amended 1st Phase of your project might look like. Stewart Title National Title Services is providing you with this requested courtesy copy requested previously in an email to me from Mr. van Ark and Patricia A. Jones, Director of Real Property C.H.S.R.A.

If we can answer any questions about the cost and requirements for you to Order this Title Policy intended to compliment work already performed by your Regional Consulting Partner, Bender Rosenthal, Inc.; please do not hesitate to call me.

Sincerely,

Louis Canaras, Senior Underwriter, V.P., Manager Commercial National Title Services
Stewart Title Guaranty Company
Houston, TX
1-800-729-1900 x8152 d/l

Californians For HIGH SPEED RAIL

DECLARATION OF SUPPORT
for
California High-Speed Rail

Today, we the undersigned organizations and institutions, representing Californians from all walks of life and throughout our great state, declare our strong support for High-Speed Rail.

The California High-Speed Rail project will...

- Immediately create hundreds and thousands of jobs to build, operate, maintain and support the nation's first high-speed rail system.
- Provide faster on-the-ground travel, connecting Californians residing and working in the north, south and central parts of our state like never before.
- Ease gridlock by easing traffic congestion on our crowded freeways and at our airports
- Help clean our air and improve our health by running on non-polluting electricity powered by 100% renewable energy.
- Help California businesses and governmental agencies meet requirements of the greenhouse gas reduction law by removing millions of tons of carbon dioxide emissions from the air.
- Stimulate new technologies, create a new industry, and position California as a transportation model for the rest of our country.

With our state's population projected to grow to 60 million people by 2050, the conditions are ripe for us to fully support high-speed rail.

Faithfully Yours,
Californians For High-Speed Rail, a grassroots statewide coalition of supporters advocating for the High-Speed Rail project approved by California voters in November 2008, and our fellow pro-HSR stakeholders...

Go to www.ca4hsr.org to sign the Declaration.

Transportation Solutions Defense and Education Fund

P.O. Box 151439 San Rafael, CA 94915 415-331-1982

April 19, 2012
Hand Delivery
& E-Mail to:
boardmembers
@hsr.ca.gov

Dan Richard, Chair
California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Re: Bay Area to Central Valley HST Partially Revised Final Program EIR Comments

Dear Mr. Richard:

The following comments are offered on behalf of the Transportation Solutions Defense and Education Fund ("TRANSDEF"), the Planning and Conservation League, and the California Rail Foundation (collectively, "Commenters"). The Partially Revised Final Program EIR ("PRFPEIR") for the Bay Area to Central Valley High-Speed Train failed to adequately respond to our comment letter on the PRDPEIR, dated February 21, 2012.

Blended Approach

In particular, the refusal to study the alternatives we proposed constitute a violation of CEQA. The Technical Memorandum on Alternatives Suggested in Comments on Partially Revised Draft Program EIR, prepared by Parsons Brinckerhoff ("PB Memo") rejects our proposal, stating that "... both the Draft and Revised 2012 Business Plans characterize the blended approach as an implementation strategy.." (PB Memo at 5.) While the Authority is entitled to see its project that way, CEQA requires it to consider input from the public. CEQA invites the public to propose alternatives with fewer environmental impacts. The PRFPEIR must analyze "whether [the] proposed alternative would avoid or substantially lessen significant environmental impacts or offer a substantial environmental advantage." (PB Memo at 2.)

The PB Memo concedes that a host of environmental impacts are lessened, concluding that: "The blended approach between San Francisco and San Jose would have fewer impacts than a full-build approach." (PB Memo at 8.) Thus, the threshold test for a citizen-proposed project alternative has been met. (We assert that the project's purported environmental benefits are overstated, because we challenge the ridership

projections, and because most of the purported noise benefits could be achieved by quiet zones--at a much lower cost.)

We contend that the concluding statement "As discussed above, the blended approach is an implementation plan and not a specific proposal or "alternative" and does not represent a stand-alone solution" (PB Memo at 12) is a mere unsubstantiated assertion with no basis in fact or argument. It is an explicit rejection of the CEQA requirement to study a citizen-proposed project alternative that meets the threshold test of "avoiding or substantially lessening any significant effects of the project." (CEQA Guidelines 15126.6(b).)

Furthermore, CEQA does not give a project sponsor discretion to adopt a project with significant impacts, when a less-impactful alternative is feasible. "Otherwise, the agency must prepare or obtain, and consider, an EIR that assesses the potential environmental impacts of the project as proposed, sets forth any feasible, less harmful alternatives to the project, and identifies any feasible mitigation measures. (§§ 21000 et seq., 21151 et seq.) The agency may not thereafter approve the project as proposed if there are feasible alternatives or mitigation measures that would avoid or substantially lessen the adverse environmental effects. (Public Resources Code § 21002.)" *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 494.

The Business Plan's reliance on the blended approach is the Authority's admission of its feasibility. This admission of feasibility means that the draft Statement of Overriding Considerations cannot be lawfully adopted. The Authority's refusal to study a blended approach alternative is what allowed it to assert that no feasible alternatives were found. That is an impermissible defense, akin to the patricide's "take pity on me, your Honor, for I am an orphan."

<u>What is the ultimate project?</u>
The reason the blended approach cannot be dismissed as a mere implementation strategy is that it involves liberalizing the HST Performance Criteria, including "Fully grade-separated guideway, Fully access-controlled guideway with intrusion monitoring systems, and Fully dual track mainline with off-line station stopping tracks." (PB Memo at 4.) This results in a different Project Description, with lower cumulative environmental impacts. This is distinct and different from a phased implementation that ends in a full-build project in the distant future. A blended approach alternative would not result in an ultimate four-track system--it would downscope the Authority's ultimate project.

That blended Project Description can then be compared against the Project Description in the PRFPEIR, and found to result in an environmentally superior project. Because the Project is now seeking funding for its first phase from the Legislature, a stable ultimate project description, with associated costs and impacts, is needed so that a determination can be made as to whether the Project is in the long-term interests of the State.

Because this is a programmatic document, the issue here is not the need for a detailed description of the blended system. Nonetheless, enough study is needed to enable the PRFPEIR to provide an analysis of whether a blended approach can meet the statutory project requirements of Proposition 1A. If it can't meet those requirements, it can't be funded with Bond money, and therefore, can't be built under the terms of the current Business Plan. We surmise that the Authority was either unwilling to take the time to determine whether the blended approach is consistent with the Bond Act, or that it already suspected an inconsistency.

Altamont Corridor Rail Project/SF

The PB Memo cites two basic reasons to refuse to study the Commenters' proposal of a route based on the Altamont Corridor Rail Project ("ACRP") which is extended from San Jose to San Francisco using the Blended approach. It asserts that the ACRP is inadequate for High-Speed operations, and that the SF-LA travel time would not meet the statutory requirement of 2:40.

ACRP Design Criteria

"The purpose of the Altamont Corridor Rail Project is to develop a joint-use regional rail corridor for intercity and commuter passenger service, not to support statewide high-speed travel." (PB Memo at 13.) This statement attempts to assert that the same rail line cannot be optimized to support both services. In the absence of any supporting evidence, this assertion cannot be accepted as fact.

"As proposed, the ACRP alignments would be designed to accommodate HST vehicles but not HST operations..." (PB Memo at 13.) By referring to only the project as it is currently proposed, this statement deliberately ignores our comments, which call for identifying why an ACRP-based route can't be made faster than the current design: "There is no evidence in previous FPEIRs that there are any speed-limiting factors specific to the Altamont Corridor. ... Because of the alternatives' potential to greatly reduce the project's environmental impacts, careful study of the potential to increase operational speeds is needed." (TRANSDEF PRDPEIR comment letter p. 6.) No attempt was made by EIR preparers to respond to this request. Instead, the Response to Comments was to continually argue that the ACRP, **as currently designed**, is inferior to HST routes studied in 2008. No evidence is offered to substantiate the presumption that the route cannot be made faster.

Travel Time

The PB Memo calculates a minimum LA-SF travel time for the proposed ACRP/SF alternative of 3:37, based on 2008 FPEIR Figure 7.2-9. (at 16.) A careful compilation of the travel times in that EIR discloses bizarre SF-SJ travel times for Figures 7.2-9 and 7.2-20. (See attached Table.) These travel times are double the time for the same trip via one of the Pacheco alternatives. The PB Memo states that the 2008 FPEIR had assumed a twenty minute stop in San Jose to change direction of the train. (at 16.) Because that is so far beyond figures seen in contemporary railroad operations, it could not have been based on evidence. The formatting of the reporting for individual alternatives prevented the big picture view necessary to identify outlying data points.

In addition, even this preposterous dwell time does not explain the full difference between SF-SJ trips via a Pacheco alternative and Figure 7.2-9. These travel times are clearly in error, and cannot be used as a basis for environmental evaluation. The travel time for an optimized ACRP has not been calculated. It is prejudicial to the evaluation of the proposed alternative to use the ACRP travel times without the speed enhancement requested by Commenters.

A further issue is that the Authority has not yet published a detailed justification for the claim that a blended alternative can produce an LA-SF travel time of 2:40. Because of that, no level playing field exists for evaluating the travel time for the Commenters' Altamont Corridor Rail Project/SF alternative. With the Authority expressing its intention to proceed with the blended approach, it is only fair that Commenters' alternative be compared to a fully vetted alternative. The refusal to study a blended alternative in this EIR prejudices the evaluation of Commenters' alternative.

If, even after optimizing Commenters' Altamont Corridor Rail Project/SF alternative for speed, and including a wye at Santa Clara, the SF-LA travel time still exceeds the statutory limit, there are still other route alternatives available for the rest of the system that would dramatically lower travel times and in concert meet the requirement: the I-5 Corridor connecting to LA via the Grapevine would be much faster and have lower impacts than routes now being pursued.

PB Memo Fabrications

When truth was inadequate to the task of supporting the DEIR, the PB Memo resorted to outright fabrication, manufacturing bogus claims and controversies. The PB Memo creates a straw man by asserting "It is unreasonable to assume that the ACRP will have no environmental impacts relative to the high-speed Altamont alternative evaluated in the EIR." (at 16.) Commenters never made any statement to which the assertion above would be appropriate. What we did state was that the alternative we proposed would avoid the most significant impacts previously identified. More egregiously, the PB Memo actually put words in Commenters' mouths: "... the claim in the TRANSDEF letter that it would have no impacts is clearly incorrect." (at 17.) There was no such claim.

The PB Memo is unprofessional in stating that "The UPRR has not shown a willingness to share its current operating right-of-way with the high-speed train anywhere in California..." as if that were an obstacle to the ACRP. Commenters' letter had recited that the very first goal of the ACRP is to move to a dedicated right-of-way independent of the UP. (2011 ACRP Preliminary Alternatives Analysis at 2-1.)

Conclusion

We urge the Authority to revise and recirculate this environmental document. It is not legally adequate for certification.

Sincerely,

David Schonbrunn, President
Transportation Solutions Defense and Education Fund

Bruce Reznik, Executive Director
Planning and Conservation League

Richard Tolmach, President
California Rail Foundation

cc: Stuart Flashman, Esq.

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April 18, 2012

Board of Directors
California High-Speed Rail Authority
700 L Street, Suite 800
Sacramento, CA 95814

RE: Final Second Revised Programmatic EIR for Bay Area to Central Valley High Speed Train Project

Dear Chairman Richard and Board Members,

I am writing on behalf of the Town of Atherton, the City of Menlo Park, the City of Palo Alto, the Planning and Conservation League, the California Rail Foundation, the Transportation Solutions Defense and Education Fund, the Community Coalition on High-Speed Rail, Mid-Peninsula Residents for Civic Sanity, and Patricia Louise Hogan-Giorni to comment on the April 2012 "Partially Revised Final Program Environmental Impact Report" ("PRFPEIR") for the Bay Area to Central Valley High Speed Train Project ("Project"). This letter follows up on my earlier oral comments at the Board meeting of April 12, 2012.

As I indicated in my oral comments, my clients very much appreciate some of the things that the Authority has done recently. We appreciate the fact that the Authority has finally put on the table the option of using the existing Caltrain tracks as part of a "blended system" approach to use of the Caltrain corridor through the Peninsula. We appreciate that Chairman Richard has publicly acknowledged some of the Authority's major past mistakes, most notably the Authority's politically-based initial decision to choose the Pacheco Pass alignment through San Jose in preference to the alternative Altamont Pass alignment. We particularly appreciate Chair Richard's statement that he intends to keep an open mind and that the public should expect major changes in how the Authority does business. This last change is, in my clients' opinion, long overdue.

That being said, my clients continue to have major problems with this latest version of the Programmatic EIR for the Project. Some of those problems re-echo past concerns about the EIR and about the Project. However, the largest concern has to do with an apparent disconnect between the Project as described in the PRFPEIR and the Project described in the very recently released revised draft business plan. The latter Project can be broadly described as a "blended system". While it continues to propose a dedicated high-speed rail right-of-way through the Central Valley, the northern and southern "bookend" segments, those leading into Los Angeles and the Bay Area, involve the use and improvement of existing rail transit infrastructure, and perhaps most notably the existing two-track system used by Caltrain between San Francisco and San Jose. Indeed, the latest business plan makes almost no mention of the previous four-track proposal for the San Francisco to San Jose segment of the high-speed rail system.

By contrast, the PRFPEIR continues to focus its analysis on precisely that four-track proposal. In response to numerous comments on the draft PRPEIR, including comments from several of my clients, the PRFPEIR asserts that the "blended system" is only an implementation strategy that need not be considered until environmental review reaches the project level. It resolutely refuses to consider or analyze the blended system as an independent alternative that could constitute an end-state for the high-speed rail system. This is in spite of Chair Richard's testimony at an Assembly Budget Committee public hearing today, April 18th, in which he asserted that the fully-

implemented blended system would meet all of the statutory mandates set by the legislature and by Proposition 1A. (I would ask that the video recording of that hearing, available on-line at the California Channel's website, be incorporated into this letter by this reference.)

In essence, the documentation contained in the current business plan, together with Mr. Richard's statements at the State Assembly committee hearing, indicate that the blended system constitutes a feasible alternative to the full four-track system analyzed in the PRFPEIR. Further, the PRFPEIR, although it does not do anything like a full or adequate analysis, nevertheless acknowledges that the blended system would have significantly fewer and lesser environmental impacts than would the four-track system that the PRFPEIR recommends for approval.

For the Authority, in the face of this evidence, to move forward with certifying the PRFPEIR and re-re-approving a four-track Pacheco Pass alignment for the Project would be a blatant violation of CEQA, as well as a disservice to all those who have worked hard to make a blended system workable.

There are numerous other flaws in the PRFPEIR that have been pointed out in the various comment letters submitted by my clients and others. I will not go into their details. Suffice it to say that these comments have identified problems in the draft PRPEIR, and those defects remain uncorrected in the PRFPEIR.

I do want to comment on one other issue that is before the Authority today. At last week's Board meeting, the Authority considered rescinding its prior certification of the earlier Revised Final PEIR and its prior approval of the Pacheco Pass alignment. The rescissions would be to comply with Judge Kenny's rulings in the Atherton I and Atherton II cases challenging those decisions. The Authority opted to defer action until this meeting. As you are no doubt aware, my clients have now appealed Judge Kenny's rulings, because we believe he failed to properly address the full extent of the failings of the RFPEIR. It is my understanding that the Board may be considering refusing to rescind its prior approvals, and consequently putting aside consideration of the PRFPEIR. I want to caution you about the potential adverse consequences of these actions,

As you may know, Public Resources Code Section 21167.3(b) provides that when an action is filed challenging an EIR, "responsible agencies shall assume that the environmental impact report or negative declaration for the project does comply with the provisions of this division and shall approve or disapprove the project ... ...Such approval shall constitute permission to proceed with the project ***at the applicant's risk*** pending final determination of such action or proceeding."

In the current situation, continuing to rely on the prior approvals in the face of the trial court's decision can be considered analogous to continuing to build a building on a foundation that a preliminary engineering analysis has found unsound. It is possible that the analysis will be reversed by further work. However, if it is not, everything built upon that foundation is placed at risk, and if the analysis is confirmed, the entire structure may have to be demolished. This state's high-speed rail system is too important to risk it on this kind of high-stakes legal gamble. The more prudent, and in the long run faster, course would be to rescind the prior approvals, revise the PRFPEIR to address a blended system alternative, as well as to correct its other errors and omissions, and then move forward on a legally firm foundation.

To repeat the statement I made prior to the Board's approving the RFPEIR and triggering round two of litigation, "It would be far better for the Board to stop, take a deep breath, and reconsider its current course of action. The Authority has already spent many months and hundreds of thousands of dollars of public money on legal battles instead of doing things right the first time. Does this Board really think it wise to

follow Authority staff down that road again? CEQA can be a problem for a public agency that wants to do things 'quick and dirty', but 'quick and dirty' is rarely the best course. You would be well advised to take some time before giving a final approval to ensure you are, in fact, 'doing it right.' "

Most sincerely,

Stuart M. Flashman

cc: Federal Railroad Administration
Senator A. Lowenthal
Senator J. Simitian
Assembly Member R. Gordon

APAC Associated Professionals and Contractors of CA, Inc.

CHSRA Board Meeting
915 I Street
Sacramento, CA
Thursday, April 19, 2012

Chairman Richard and Authority Board Members. I am Diana LaCome, President of Associated Professionals and Contractors of California. My comments are as follow:

APAC is requesting that the Authority set a minimum Disadvantaged Business Enterprise (DBE) Goal of 10% within your overall 30% SBE Goal. A 10% DBE Goal is the minimum standard set by U.S. DOT. on federally funded contracts.

The authorization for establishing a DBE Goal comes directly from FRA, in their September 15, 2011 Letter to the Authority, in response to our Title VI Complaint. Please refer to page 3, the highlighted section which states:

1) The Grantee agrees to (a) provide maximum practicable opportunities for small businesses, including veteran-owned small businesses and service disabled veteran-owned small businesses and b) implement best practices, consistent with our nation's civil rights and equal opportunity laws, for ensuring that all individuals- regardless of race, gender, age, disability and national origin- benefit from activities funded through this Agreement.

2) An example of a best practice under (b) above should be to incorporate key elements of the Department's Disadvantaged Business Enterprise (DBE) program (see 49 C.F.R. Part 26) in contacts under this Agreement. This practice would involve setting a DBE contract goal on contracts funded under this Agreement that have subcontracting possibilities. The goal would reflect the amount of DBE participation on the contract that the Grantee would expect to obtain absent the effects of discrimination and consistent with the availability of certified DBE firms to perform work under the contract. When a DBE contract goal has been established by a grantee, the contract would be awarded only to a bidder/offer that has met or made (or in the case of a design/build project, is continuing to meet or making) documented good faith efforts to reach the goal. Good faith efforts are defined as efforts to achieve a DBE goal or other requirement of this Agreement which, by their scope, intensity and appropriateness to the objective can reasonably be expected to achieve the goal.

   Whether by commission or omission, the DBE community has been damaged so far on this project. Please do the right thing and set a DBE Goal.

   Thank you for your attention this morning.

11 Embarcadero West, Ste. 210 ~ Oakland, CA 94607 ~ 510.557-3810 ~ dlacome@aol.com

U.S. Department
of Transportation

Federal Railroad
Administration

1200 New Jersey Ave., SE
Washington, D.C. 20590

September 15, 2011

Fedex Number: 7975 1456 4875

Roelof van Ark
Chief Executive Officer
California High-Speed Rail Authority
925 L. Street
Suite 1425
Sacramento, CA 95814

Re: DOT Complaint Number: 2011-0065
Associated Professionals and Contractors v. California High-Speed Rail Authority

Dear Mr. van Ark:

This is the final decision with respect to the above referenced complaint filed on December 8, 2010, against the California High Speed Rail Authority (CHSRA or Authority). In the complaint, the Associated Professionals and Contractors (APAC) alleged discrimination by the CHSRA for its "lack of minority-owned business participation in the development of the high-speed rail." The Federal Railroad Administration (FRA), Office of Civil Rights (OCR) of the U.S. Department of Transportation (DOT), has now completed its investigation. This letter is to inform you of the results of our investigation.

Allegation

"California is in the process of constructing a high-speed rail system, with massive financial assistance from the federal government. The project is expected to cost in excess of $43 billion, making it the country's largest public infrastructure project. The federal government is anticipated to fund nearly half of the project, with $3.05 billion in federal stimulus funds already awarded, and an additional $15-17 billion expected to be awarded before project completion. Yet as this enormous public works project gets underway, it has become apparent that the state agency responsible for its oversight is largely excluding minority-owned businesses from the contracting opportunities that the project brings. Through a restrictive procurement system and a *laissez-faire* attitude, the California High-Speed Rail Authority ("CHSRA") is funneling nearly all contracting dollars to large majority-owned firms. CHSRA's practices are in direct violation of Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit federal funding recipients from engaging in unjustified practices that exclude minorities."[1]

[1] Complaint, APAC v. CHSRA, page 1.

Jurisdiction

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits discrimination on the basis of race, color and national origin in Federally-funded programs and activities. The DOT and its operating administrations enforce Title VI and investigate complaints against recipients of financial assistance from DOT. The CHSRA is a recipient of Federal financial assistance from DOT through FRA and, therefore, Title VI applies to its federally funded programs and activities and the FRA has jurisdiction over it. *See* 49 C.F.R. Part 21.

The Complainant

The Complainant is the Associated Professionals and Contractors, a non-profit organization founded to "encourage, develop and support Disadvantaged Business Enterprises ("DBEs") and other businesses traditionally excluded from equal opportunity."[2] The Complainant is represented by the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. More than eighty individual businesses provided information during our investigation.

The Recipient

The CHSRA is the California state agency established to develop and implement high-speed intercity rail service. *See* California High-Speed Rail Act (S.B. 1420, Chapter 796 of the California Statutes of 1996).

Background

Our investigators reviewed information and data provided by the Complainant, the CHSRA and the California Department of General Services (DGS), Procurement Division. In an effort to clarify information provided in documentation sent by the Complainant, FRA investigators also interviewed representatives from nine firms. We also used information gathered from conversations held with representatives from CHSRA ancillary to the complaint (while providing technical assistance).

Factual Analysis

According to DOT's records, FRA entered into two cooperative/grant agreements with the CHSRA in 2002 and 2003. Cooperative agreement number DTFRDV-02-H-60026 was for the preparation of environmental documentation for the California statewide high-speed rail system. Cooperative agreement number DTFRDV-03-H-60032 was for the final environmental impact report/environmental impact statement, implementation planning and public outreach for the California high-speed train system. These cooperative agreements provided funds in the amount of $2.5 million and were expended during the period of 2002 through 2006. Each grant had the

[2] Complaint, APAC v. CHSRA, page 8, II Jurisdictional Facts, A. Complainants.

following clause related to small business utilization:

> Participation by Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals.
>
> FRA encourages the Grantee to utilize small business concerns owned and controlled by socially and economically disadvantaged individuals (as that term is defined for other DOT agencies in 49 C.F.R. Part 26) in carrying out the Project.

In implementing its High-Speed Intercity Passenger Rail Program (HSIPR) as authorized by the Passenger Rail Investment and Improvement Act of 2008, FRA has entered into two additional cooperative agreements with the CHSRA. Agreement Number, FR-HSR-0009-10-01-00, was executed on September 23, 2010, and amended on December 29, 2010 (FR-HSR-0009-10-01-01) and again on August 8, 2011 (FR-HSR-0009-10-01-02). Agreement Number, FR-HSR-0037-11-01-00, was executed on June 9, 2011. The original cooperative agreement covers funds appropriated in the American Recovery and Reinvestment Act of 2009 and the second addresses a portion of the funds appropriated in the FY 2010 Department of Transportation Appropriations Act that have been allocated to the CHSRA.

The original cooperative agreement, FR-HSR-0009-10-01-00, between FRA and CHSRA contained a clause in Section 11, Paragraph g, which is identical to the clause in the 2002 and 2003 cooperative agreements above.

This clause was revised in amendment number 2 to the cooperative agreement and now states:

1) The Grantee agrees to (a) provide maximum practicable opportunities for small businesses, including veteran-owned small businesses and service disabled veteran-owned small businesses, and (b) implement best practices, consistent with our nation's civil rights and equal opportunity laws, for ensuring that all individuals – regardless of race, gender, age, disability, and national origin – benefit from activities funded through this Agreement.

2) An example of a best practice under (b) above would be to incorporate key elements of the Department's Disadvantaged Business Enterprise (DBE) program (See 49 C.F.R. Part 26) in contacts under this Agreement. This practice would involve setting a DBE contract goal on contracts funded under this Agreement that have subcontracting possibilities. The goal would reflect the amount of DBE participation on the contract that the Grantee would expect to obtain absent the effects of discrimination and consistent with the availability of certified DBE firms to perform work under the contract. When a DBE contract goal has been established by a grantee, the contract would be awarded only to a bidder/offer that has met or made (or in the case of a design/build project, is continuing to meeting or making) documented, good faith efforts to reach the goal. Good faith efforts are defined as efforts to achieve a DBE goal or other requirement of this Agreement which, by their scope, intensity, and appropriateness to the objective can reasonably be expected to achieve the goal.

3) The Grantee must provide FRA a plan for incorporating the above best practice into its implementation of the Project within 30 days following execution of this Agreement. If the Grantee is not able to substantially incorporate Part 26 elements in accordance with the above-described best practice, the Grantee agrees to provide the FRA with a written explanation and an alternative program for ensuring the use of contractors owned and controlled by socially and economically disadvantaged individuals.

This cooperative agreement addresses implementation of the high-speed rail program, principally environmental assessment work and construction of a segment of the system in the Central Valley of California, assuming environmental approvals are secured. The period of performance is August 17, 2010 through December 31, 2012, with the provision that funds can be expended for activities back to February 2009. According to the FRA Grant Manager, CHSRA has not expended funds retroactively. This agreement was amended on December 29, 2010 to extend the period of performance to September 30, 2017.

The second cooperative agreement (FR-HSR-0037-11-01-00) also contains the updated Section 11, Paragraph g. This second agreement addresses the development of positive train control in the San Francisco to San Jose section of the high-speed rail system and has a performance period of August 1, 2011, through August 31, 2012.

On October 13, 2010, the Director, OCR, sent a letter to all High-Speed Rail program grantees, including CHSRA, congratulating their entry into the High-Speed Intercity Passenger Rail Program. In the letter, the Director asked for information related to how the grantee would comply with the agreement section concerning small business. On December 17, 2010, CHSRA responded saying that the Authority operates under State of California contracting laws for Small Business Enterprise (SBE) and Disabled Veterans Business Enterprise (DVBE) participation. The Deputy Chief Executive Officer stated that CHSRA was operating under the goals of 3% for DVBE per California Public Contract Code § 10115(c) and 25% for SBE under Governor Schwarzenegger's Executive Order #S-02-06. She said the contracting agent, DGS, oversees implementation of the goals.

In this same letter, CHSRA committed to:

1. Develop a formal policy regarding responsibility to promote diverse business involvement.
2. Develop a process to engage and promote participation by all sectors of business to include small business and disadvantaged business enterprise.
3. Work with California Department of Transportation (Caltrans) and DGS to develop a Business Advisory Council.
4. Work with DGS and Department of Commerce's (DOC) Minority Business Development Agency (MBDA) to have outreach strategy.
5. Develop an integrated tracking mechanism.

In January 2011, the FRA OCR asked for information related to the demonstrated efforts made by the grantees to reach out to DBEs and small businesses concerning the high-speed rail program. Grantees were asked to provide a brief narrative describing the project and current

state of progress, including contract award amounts to small and disadvantaged businesses expressed in dollars and as a percentage against the total awards and contract dollars (payments) made to the reported contractors. On March 4, 2011, the Deputy Chief Executive Officer of CHSRA replied that CHSRA was developing outreach strategies and was working with other agencies to give small businesses access to prime contractors. She again reiterated that CHSRA was following the State of California guidelines for contracts with small businesses and disabled veterans business enterprise. CHSRA said that they only began tracking DBE participation upon receipt of federal funds. The attachment to the letter listed the supplier diversity goals for 2010 as 20% for small businesses and 5% for DVBEs. CHSRA stated that in CY 2010 it achieved a 6.9% ($89,903,687) for small businesses and DBEs and that the total percentage for all special small business and veteran programs was 12.87% ($167,740,238).

The Complainant provided information it gathered related to small business utilization by CHSRA over the prior six fiscal years. APAC states that only 3.54 percent of contracting dollars have gone to small or micro businesses during that time frame. In the February 22, 2011, letter signed by Deputy Attorney General Steven Green from the State of California responding to the allegations in the complaint, Mr. Green states that the complaint "focuses on perceived DBE deficiencies in the Authority's contracting during many prior years before federal funding..."[3] It now appears that the information provided by the State of California is not entirely correct as FRA and CHSRA entered into cooperative agreements during the 2002-2006 time frames involving $2.5 million in federal funding. Using the documentation CHSRA provided to the complainant referencing those time frames, it appears that from 2004-2007, CHSRA expended $332,215,167. Of that, $7,980,620 went to Small Business/Micro Business. This equates to 2.4 percent of the expenditures. During the same time frame, CHSRA made reports to the DGS that reflect how many of these small/micro business contracts went to minority and women owned businesses. The reports were blank with statements ranging from "No information provided" to "the agency does not have a system to track the information" to "we are developing a system to track this in the future."

The Complainant alleges that the CHSRA's contracting approach, while facially neutral, has a disparate impact on minority-owned businesses. The Complainant points to several factors in support of its claim, the first of which is that the CHSRA did not conduct adequate outreach and consequently, many businesses were unaware of bidding opportunities until it was too late to act. A large number of the Complainant firms alleged that they never heard of CHSRA contracting opportunities at the time they were put out for bid or learned so late in the process that they could not compete in a meaningful way. The Complainant also points out that the proposed design contracts were not unbundled into smaller packages that small and disadvantaged businesses would be equipped to handle as prime contractors. Of the small and disadvantaged businesses that worked on the project so far, a few have reported experiencing prime contractors that have failed to make payments to subcontractors in a timely fashion and a moving target of expectations and time tables.

Of the 80 firms that provided information to the Complainant, most of the firms never heard of or saw any advertisement on contracting opportunities with the CHSRA. Thirty-one of these firms provided written information about their experiences with the CHSRA. The information

[3] February 22, 2011, letter from California DOJ to Calvin Gibson, page 2, second paragraph.

reflected the experiences of those firms in three categories: those that never heard or saw any opportunities, those that heard of contracting opportunities but were unsuccessful in securing work and those that secured work on a contract but experienced difficulties or concerns.

Of the thirty-one firms that provided written information, FRA OCR staff interviewed representatives from nine small and minority businesses about their specific experiences. Of these nine firms, only three secured work on a contract. Of the other six, either they never heard of any contracting opportunities or did hear of contracting opportunities but were unable to secure any work on any of the contracts. The representatives stated that the CHSRA did not do any outreach to small businesses until after the complaint was filed. They also said that the CHSRA did not use the same procurement processes that other state agencies used – such as advertising opportunities on BizSync or posting future opportunities on their website. Some of the representatives felt that the CHSRA participation in the Small Business Conference that was held in Los Angeles in April 2011 was too late. They said that the prime contractor firms set their teams together far in advance of a request for quote (RFQ) coming out and by the time the RFQ comes out, it is too late for small businesses to get on a team.

A number of the representatives said that when they approached the CHSRA about the issue, they were told that CHSRA could not do any outreach, especially to small businesses, because CHSRA was too small and does not have staff for that. One of the representatives pointed out that at a conference held in Los Angeles in April 2011, the Chief Executive Officer attended and gave a presentation, but did not stay around after his presentation to hear any of the comments made by the community members or small businesses. The representatives said this was one more example where the CHSRA does not seem to care about small and disadvantaged businesses. Another representative said the Chief Executive Officer gave a presentation at the Hispanic Chamber of Commerce in May 2011, and when asked how many small Hispanic businesses were working on the CHSRA contracts, the Chief Executive Officer said he didn't know, but stated that the CHSRA had not spent any federal money yet.

Some of the representatives expressed concern that the large firms selected as prime contractors were not headquartered in California or even in the United States. They said if this money being invested in High-Speed Rail was to stimulate the United States economy, it appears that this is going overseas and not helping the local economy. One representative said that the CHSRA has said this is a high-tech thing and that small businesses cannot do the work nor do they have the expertise to do the work. This representative said that many of these small businesses have worked on other rail projects in California – like BART and Metro Rail or throughout the country – like the Northeast Corridor project, so this assumption by CHSRA was unwarranted.

Of the three firms that secured work on a contract, each reported experiencing problems. The first firm was a minority/woman-owned firm that provides civil and environmental engineering and construction management services. The firm was only successful in obtaining a small subcontract on one of the teams because someone at the prime contractor knew the representative personally. The firm completed the whole process with the prime contractor that submitted information for two segments. One of the segments won, but the representative is concerned that their firm will not receive any more work as the person at the prime contractor that knew of the minority/woman-owned firm, has since left the prime firm. Their firm has been told to hold off

until fiscal year 2013 before they will to do any more work. During the firm's participation on the contract, payments were extremely slow. As of May 2011, they had not been paid since September 2010 and they were told that it was because the federal budget was not passed.

The second firm that received work on a contract was a subcontractor 3 or 4 tier from the prime contractor. It is a small environmental firm that has worked on rail projects since the early 1980s. The representative said that once they started the contract, the prime contractor kept changing the schedule and deadlines. The representative said the firm was completing the work assigned to it when the prime contractor brought in a larger firm (another prime firm) to "help" their firm but the larger firm ended up taking over the job. The prime contractor did not fire their firm but gave the work to the other prime firm who still has not finished the job years later. The representative said that the prime contractor is still using their name and certification on the contract but the firm is not doing any work. The representative also said that the firm was not paid on time or at all. When the representative went to CHSRA about the lack of payments, CHSRA said it was an issue between their firm and the prime contractor. They were told by the Project Management Team (PMT) to continue working on the job even if there was no money or they were going to be taken off the job. The representative said that if there was a problem with getting money from the state, then the prime contractor should stop all work until the money issue was resolved. The representative also said that the CHSRA was blaming overruns on the small businesses but the real reason was mismanagement by the PMT and all the changes to the work. According to the representative, the company that replaced their firm on the project had been sanctioned by a rail company and another rail company is currently in the process of sanctioning them. The representative stated that because of the lack of payments and delay in payments, the firm is on the brink of going out of business.

The third firm was a subcontractor on the contract and had hired 4 subcontractors including the second firm listed above. The representative said that the Project Management Company went through seven PMT's from January 2007 to December 2009. They said that the project changed and was constantly a moving target, work stopped and started, there were "unbelievable" deadlines that were alleged to be to comply with federal funding and the firm's employees were harassed by the current PMT. It became clear that this firm then became the scapegoat on the project. The PMT told them they did not know what they were doing and that they were bringing in another firm to help them. That firm (another prime contractor) came in and took over everything. However, that new firm still has not met the deadlines that their firm was told were essential. During the firm's time on the contract, it was not paid on time or at all. The firm's owner had to drain her retirement account and insurance policy, rack up credit card debt and borrow from family members to keep the business afloat. The representative said their firm and the employees that work for the firm individually supported the project of high-speed rail in California, but they were slapped in the face when the PMT posted a letter on the Project Management's website (that all companies on the project could see) that lambasted the firm and their lack of work. The representative said they have contacted their lawyer about the lies in the letter. Additionally, the representative said that since their work on the project, the reputation of the firm has been tarnished with the city planners they worked with because of all the changes made on the project. The representative said that the CHSRA and the prime contractors connected with the project do not have a clear understanding of how non-payment and slow payment affects the small businesses that work on the projects.

During the conversation on June 10, 2011, a staff member of the FRA OCR was called by the CHSRA Outreach Coordinator and asked to participate in a meeting that included the procurement person and a contractor. The meeting was on developing the process for small businesses. During the meeting, the FRA staff member was questioned about the requirements for a DBE program and reminded that California has Proposition 209 which prohibits race-conscious small business programs and goals. The FRA staff member mentioned that OCR was still waiting for their plan. The CHSRA stated they were unaware of any requirement to submit a plan. The FRA staff member also mentioned the requirement and goal for small business utilization attached to the Governor's Executive Order (EO) and they said that the EO does not apply to them. However, according to the December 17, 2010, letter signed by the Deputy Chief Executive Officer, the CHSRA is operating under the State of California contracting laws for Small Business Enterprise and Disabled Veterans Business Enterprise (to include the Executive Order #S-02-06 which has a 25% goal for small business utilization. Again, in the March 4, 2011, letter, the Deputy Chief Executive Officer stated that the CHSRA follows the guidelines of the State of California for contracting for SBE and DVBEs. It appears that there is a disconnect between the official statement and the actual understanding of CHSRA's responsibilities as it relates to small businesses.

FRA recognizes the specific California constitutional provision that prohibits state action that involves any preferential treatment based upon race or gender. Article I, Section 31 of the California Constitution, adopted through the 1996 passage of Proposition 209, prohibits the State from classifying individuals by race or gender, including utilizing such classifications in the awarding of public contracts. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1440 (9th Cir. April 08, 1997) , opinion amended and superseded on denial of rehearing *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. Apr 08, 1997), as amended on denial of rehearing and rehearing en banc (Aug 21, 1997), as amended (Aug 26, 1997), stay denied. *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, (9th Cir. Aug 26, 1997) and stay denied *Coalition For Economic Equity v. Wilson*, 521 U.S. 1141, (Sep 04, 1997) and cert denied *Coalition For Economic Equity v. Wilson*, 522 U.S. 963 (Nov 03, 1997); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1070-71 (Cal. 2000). The full effects of this provision applied during the period prior to CHSRA receiving Federal funds and to activities carried out solely with state funds. However, section 31(h) provides an exception for Federal funding eligibility, though it only applies when Federal funds are contingent on complying with a race conscious requirement.

The CHSRA stated in its correspondence to FRA in February 2011 through the California Attorney General, that it was integrating DBEs into the tracking system to monitor compliance with existing California laws concerning small business and disabled veterans business enterprises. The CHSRA also indicated that it was developing by-laws and working with the Caltrans, DGS and considering working with the California Small Business Roundtable to develop a Business Advisory Council to better communicate issues and concerns of the small and disadvantaged business communities to the CHSRA Board.

In the same February 2011 correspondence, the CHSRA, stated that it was "working with DGS and the Minority Business Development Agency of the U.S. Department of Commerce to

develop an outreach strategy so that small businesses have access to larger prime contractors and such contractors gain access to the expertise of smaller businesses, including conducting events for this purpose throughout the state. In addition, the Authority will provide training for existing contractors in the goals and requirements for small business participation."[4] At the conclusion of the investigation, the CHSRA had not provided any specific plan or information related to their processes and procedures; however, a plan has now been provided.

Legal Analysis

Title VI prohibits discrimination on the basis of race, color, or national origin in connection with a program or activity that receives federal financial assistance. Complainant's basis for seeking relief under Title VI is based on the alleged disparate impact of CHSRA's procurement system, which complainants claim "disproportionately excludes minority-owned businesses" with no legitimate justification.

To establish discrimination under a disparate impact scheme, an investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI. *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1981). The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected group.

Complainants concede that the CHSRA's procurement system is facially neutral. Complainants allege that there has been "virtually no minority business participation on CHSRA contracts. The FRA investigation established that there was some participation by minority subcontractors, albeit at a very low rate. Some of the subcontractors reported problems with management practices and prompt payment.

No one has attempted to do an availability study to establish the availability of minority and woman-owned contractors. In the absence of accurate current availability data, there is no data from which we can conclude that the CHSRA's contracting practices have a disparate impact on women-owned and minority-owned contractors. The FRA investigation also established that CHSRA unquestionably has had little commitment to collecting accurate statistics on the amount of contract dollars it awards to women-owned and minority owned contractors.

Absent an availability study, it is not possible for us to establish a violation of Title VI. However continued business practices such as those employed by the CHSRA in implementing the project coupled with a failure to complete, in a timely fashion, formulation of a coherent policy for small and disadvantaged business utilization and inclusion could potentially result in a violation in the future. Our concern is that by the time a future complaint was investigated, many opportunities for small and disadvantaged business participation will have been foreclosed. Because of this, we are requiring the CHSRA take action in accordance with the existing cooperative agreement between FRA and CHSRA as a condition of receiving continuing Federal funds.

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[4] February 22, 2011, letter from Deputy Attorney General Steven Green, page 3, second paragraph.

Required Action by CHSRA

As a result of our investigation, we are requiring the Authority to take the following actions:

1. The CHRSA must specify which officer is responsible for its DBE program. The officer must have direct, unfettered access to the CEO of the CHSRA and sufficient resources to discharge the duties of the position. This person must be identified in writing to the FRA within 60 days of the date of this letter.

2. The CHSRA must conduct an availability and disparity study. This study must be completed no later than one year from the date of this letter and be submitted to the FRA. The CHSRA may use information from relevant existing transportation services' disparity studies as part of this effort, with approval from the FRA. The CHSRA may use information from the National Cooperative Highway Research Program (NCHRP) Report 644, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program* and NCHRP Synthesis 416, *Implementing Race-Neutral Measures in State Disadvantaged Business Enterprise Programs*. Both of these documents are available at the Transportation Research Board's website http://www.trb.org/Main/Home.aspx.

3. The CHSRA must establish, maintain and make available to interested persons a directory identifying all firms eligible to participate as small and/or disadvantaged businesses in its program. This directory shall be developed within 60 days from the issuance of this letter and its development shall be confirmed in writing to the FRA. In the listing for each firm, the directory must include the firm's address, phone number, and the types of work the firm has been certified to perform as a small and/or disadvantaged business. The directory must be updated at least annually and made available to contractors and the public on request and published on CHSRA's website.

4. The CHSRA must establish a small and disadvantaged business development program (BDP) within 60 days from the issuance of this letter to assist firms in gaining the ability to compete successfully in the marketplace. The CHSRA has the option of creating this BDP separately or as a "mentor-protégé" program, in which another firm is the principal source of business development assistance.

5. The CHSRA must establish a Business Advisory Council within 60 days of the issuance of this letter to better communicate issues and concerns of the small and disadvantaged businesses to the CHSRA Board.

Rather than provide comments on the draft plan submitted by CHSRA, it must file within 60 days from the issuance of this letter a revised comprehensive plan to comply with Section 11, Paragraph g, of the cooperative agreement between FRA and CHSRA. The plan should address how the CHSRA will comply with the updated clause included in the cooperative agreements and must also address:

- Prompt payment of subcontractors by prime contractors and timely resolution of the payment issues.

- Alternative acquisition strategies and procurement structures to facilitate the ability of consortia or joint ventures consisting of small businesses to compete for and perform prime contractor contracts.
- The methodology to set goals for small and disadvantaged business utilization.
- The methodology to set goals for high-speed rail vehicle manufacturers.
- The process for assuring that when CHSRA has established an overall contract goal for small and disadvantaged business participation, it awards every contract only to a bidder/offeror that makes good faith efforts to meet it. The plan must describe how CHSRA will determine that a bidder/offeror has made a good faith effort.
- Replacement of a small and disadvantaged business as a subcontractor by the prime contractor as alleged by the Complainant representatives.
- The methodology to count small and disadvantaged business participation toward the goal.
- Certification standards and procedures. FRA encourages CHRSA to work with the California Uniform Certification Program (UCP) concerning certification matters.
- The methodology for resolving disputes concerning the implementation of the plan.
- Plans to publicize RFQs and its deadlines and where to publish announcements.
- How to ensure that small businesses are aware of the opportunities in sufficient time to submit a meaningful bid.

The CHSRA should consider 49 C.F.R. Part 26 in developing its plan. The Authority will provide the FRA Office of Civil Rights quarterly updates on these actions.

Conclusion

We are committed to resolving this matter in a productive and amicable manner. Please call Ms. Rosanne Goodwill at (202) 493-6010 if you have any questions.

You should be aware that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI. Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice. We would investigate such a complaint if the situation warrants.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that we receive such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We would like to thank your staff for being cooperative and helpful during this investigation. I am looking forward to working with you to resolve these matters expeditiously.

Sincerely,

Calvin Gibson
Director
Office of Civil Rights

cc: Oren Sellstrom
Steven Green